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In the Supreme Court of the United States

OCTOBER TERM, 1958

MURRAY BERMAN AND MAYFLOWER MANUFACTURING CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

FABRIC GARMENT CO. INC., AND JOSEPH ABRAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 262 F. 2d 631. The opinion of the district court deny-

ing the motion for a new trial (R. 916–922)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1958 (SR. 39a). On January 20, 1959, Mr. Justice Harlan extended the time within which to file the petitions for writs of certiorari to and including February 28, 1959. The petitions were filed on February 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the convictions were supported by substantial evidence.

2. Whether the trial court abused its discretion in denying a motion for new trial.

3. Whether the trial court erred in withholding from the defense a pretrial affidavit made by a government witness.

4. Whether a conversation during the life of the conspiracy with a co-defendant who was acquitted was admissible, where the jurors were instructed that they must find that the co-defendant was a member of the conspiracy before they could consider his conversation as evidence against petitioners.

5. Whether the court of appeals erred in concluding that any objection to the venue of the conspiracy count

[1] The first three volumes of the record are paginated consecutively from 1 to 926, and will be referred to as "R.". Volume IV, paginated 1a to 174a, will also be referred to as "R.". Volume V, consisting of a supplemental appendix filed by petitioners in the court below and the proceedings in that court, paginated 1a to 43a, will be referred to as "SR.".

had been waived, and that venue had been proved in any event.

STATEMENT

Petitioners are the Mayflower Manufacturing Corp. (Mayflower) and its president, Berman (in No. 732), and the Fabric Garment Co., Inc. (Fabric), and its nominal secretary but actual chief officer, Abrams (in No. 733). In 1951 Fabric was furnished by the Government large quantities of olive-drab wool serge to be used by it in making "Eisenhower" jackets under contracts with the New York Quartermaster Procurement Agency. Petitioner Abrams is alleged to have misappropriated 19,000 yards of that serge and to have sold it, with the aid of petitioner Berman, to a third party. The convictions involved here are based primarily upon that alleged sale.

All four petitioners were convicted of the unauthorized sale of Government-owned property in violation of 18 U.S.C. 641. Petitioners Fabric and Abrams were also convicted of submitting false statements to the Government (in accounting for the government-furnished property under the contracts) in violation of 18 U.S.C. 1001. Finally, all four petitioners were convicted of a conspiracy to submit the false statements and to defraud the United States in violation of 18 U.S.C. 371.[2] Petitioner Abrams was sentenced to concurrent terms of thirty months' imprisonment on the sale and conspiracy counts and was given a suspended sentence on the false statement counts

[2] The sale and conspiracy counts were charged in indictment No. C 144–188 (R. 27–33); the false statement counts were charged in indictment No. C 144–185 (R. 10–15).

(R. 747–748, 755–756). Petitioner Berman was sentenced to concurrent terms of six months' imprisonment on the sale and conspiracy counts (R. 757–758). The corporate petitioners were given suspended sentences (R. 746, 751–752). The court of appeals reversed the convictions on two (of the eight) false statement counts but otherwise affirmed the judgments (SR. 20a–39a).

A. THE TRIAL PROCEEDINGS

1. It is undisputed that there was sufficient evidence to establish the following facts:

Fabric was furnished 74,133 yards of 18-ounce olive-drab wool serge under a contract (QM 8944) awarded it on January 5, 1951 (R. 129, 537–539), and 351,743 yards under a contract (QM 12372) awarded it on February 20, 1951 (R. 131, 563–564).[3] During July and August 1951, petitioner Abrams sold, through petitioner Berman,[4] 19,000 yards of olive-drab wool serge to the Alert Trading Co.[4] at a price of $3.90 per yard.[5] The serge had been delivered by Abrams to Berman in January or February 1951 and had been stored until the sale at premises at 450 Liberty Avenue, Brooklyn, New York, which Berman had rented in Mayflower's name. (R. 64–65, 71–72, 75, 84–85, 91–92, 113–115, 17a, 21a, 48a.)

[3] All yardage measurements are in linear yards of 56-inch wide material, with material furnished in other widths having been converted to 56-inch equivalents. Fractional yards have been rounded off to the nearest whole number.

[4] Alert and its president, David G. Hartmann, were also named in the indictment but were acquitted by the jury.

[5] The market price was then $4.25 per yard (R. 50, 51).

Checks received from Alert in July and August in payment for the serge were deposited in a bank account opened by Berman in Mayflower's name (R. 85). On August 17, 1951, a check for $15,000, payable to Thurman Hill, was drawn on that account and deposited by Hill in his own account in Washington, D.C. (R. 526–527, 532). Hill thereafter purchased two oil leases for petitioner Abrams at a cost of $15,000 (R. 527–531).

In December 1951, the Federal Bureau of Investigation began an investigation of a report that Alert had a large quantity of olive-drab wool serge for sale.[6] On December 22, 1951, Agent Mulderig, having learned that Alert had purchased the serge from Berman, undertook to interview Berman but found the Mayflower premises locked. Abrams, upon inquiry by the agent both then and on several occasions in January and February 1952, denied having seen Berman or knowing how to locate him. Harold Hyman, the nominal president of Fabric,[7] told the agent on February 12, 1952, however, that Berman had visited the Fabric plant about three weeks earlier (R. 63, 67–69). In fact, Berman had gone to Atlantic City, New Jersey, for the period from December 27, 1951, to January 14, 1952, registering at the Penn-

[6] The report probably came from Joseph Cooper (R. 52–53), who also testified at the trial that in December 1951 Hartmann (president of Alert) had offered to sell him 18-ounce olive-drab wool serge for $3.75 per yard (when the market price was $4.25 per yard) and had told him that he (Hartmann) had paid $2.25 per yard for the cloth (R. 46–47).

[7] Hyman was also named in the indictments, but his convictions were reversed by the court of appeals.

Atlantic Hotel under the name of David Berke (R. 98–99, 105).

In late 1951 or early 1952, Abrams attempted unsuccessfully to obtain from the trucking company which had delivered the serge to Alert the receipts showing the deliveries of the serge. They were later turned over to the F.B.I. (R. 150–152).

At the premises at 450 Liberty Avenue formerly occupied by Mayflower were found several pieces of cardboard bearing the number of Fabric's second contract and, on the second floor, a mill ticket indicating that the roll of cloth to which it had been attached had been shrunk at the Philadelphia Quartermaster Depot on January 25, 1951 (R. 75, 95, 298–299, 339–340).

2. To support the inference that the olive-drab wool serge sold by Abrams and Berman to Alert came from the Government-furnished serge then in Abrams' possession, the Government sought to show that Fabric had not accounted for all of the serge furnished to it under the contracts. Under the terms of the contracts, Fabric was required to return to the Government, in addition to the finished jackets, all remnants, scraps and clippings (R. 127–131, 690–694, 156a–168a). The number of jackets of each size delivered, and the weight of the scrap returned to the Government under each contract was undisputed. Since the material furnished by the Government was 18-ounce serge—*i.e.*, weighed 18 ounces per linear yard—the yardage equivalent of the scrap returned could be determined from its weight by a simple mathematical computation.

To determine the yardage of serge contained in each finished jacket delivered, the Government began with the area of the patterns from which each size jacket was cut. Reproductions of the original patterns made out of a special hard paper were weighed by the physical testing laboratory at the Philadelphia Quartermaster Depot and the weight compared to the weight of a square yard of the same paper. This method of measuring the area of the irregularly-shaped patterns—the so-called "paper test"—was described in detail at the trial (R. 448, 459, 485–492, 542–543, 136a–137a, 168a, Gov't. Ex. 172). William Schneider, chief cutter for Fabric, had testified that in the manufacture of the jackets under the contracts the several parts of each jacket were cut by following "markers" made from reproductions of the patterns furnished Fabric, using first-class commercial practices to conserve material in the cutting (R. 260–261, 266-273, 277, 288, 295–304). Although the main parts of the jackets were cut "exactly the same as the pattern", it was necessary, because of sewing methods used by Fabric, to cut some of the jacket trimmings, such as the patch pocket, the pocket flap, the underside of the collar, and the belt pieces "a trifle larger than the pattern" (R. 285–286). Those pieces, however, were then trimmed to specification after sewing (R. 639–642).

From the area of the patterns used (established by the paper test), the evidence that the jacket parts were cut exactly from the patterns, and the number of jackets delivered, the Government computed the

yards of serge contained in the delivered jackets. The results of this computation—and of the computation of the yards of serge represented by the returned scrap (computed from its weight)—were shown on Government Exhibit 177, reproduced at No. 732, Pet. 54. In summary, it showed that there were 4,974 yards of serge furnished by the Government under the first contract which were not accounted for by the jackets and returned scrap and 25,819 yards under the second contract, a total of 30,793 under the two contracts. Under two other contracts awarded to Fabric in December 1951 (QM 21996, R. 135–141; QM 22965, R. 142), there were similarly 14,084 and 1,574 yards, respectively, not accounted for, making a total on all four contracts of 46,451 yards.[8]

3. The defense sought to show that the serge sold to Alert was war surplus material purchased by Abrams in 1946 and that the Government-furnished serge which was not accounted for by the finished garments and returned scrap could be explained by the fact that some scraps and clippings were not returned to the Government but were used for other purposes or thrown away.

Petitioners introduced evidence that early in 1946 Abrams purchased, at a price of about $2.75 per yard,

[8] Although the last two contracts were not awarded until after the alleged sale to Alert, they are relevant because of the possibility that scrap from those contracts could have been returned as scrap from the second contract (the last load of which was not returned until after the later contracts were awarded, R. 170a, Gov. Ex. 180) in order to conceal the shortage on the second contract.

some 300 to 340 pieces of 18-ounce olive-drab wool serge, most of it war surplus goods, from a local selling agency. This cloth mildewed within three or four months because Abrams stored it under improper conditions (R. 587–589). Sam Goldman, a friend of Abrams, testified that he stored this cloth for Abrams at Goldman's plant, free of charge (R. 141a), from 1947 until the middle of 1951 (R. 596–599), when Goldman began to deliver the material to the premises occupied by Mayflower (R. 606, 615–616). Goldman testified that his son had made the deliveries over a period of several months, but he admittedly had no records or documents of any sort relating to the storage and delivery (R. 142a–143a).[9]

Government witness Schneider (Fabric's chief cutter) testified that not all the clippings were saved and returned to the Government. Some pieces were used, in accordance with commercial practice, for various incidental purposes, such as making aprons and knee pads, cleaning or testing machines, mopping up water, etc. Other pieces inevitably fell to the floor, where they were swept up and thrown away (R. 312–315, 332–334).[10] Asked whether such diversions might account for 60,000 yards, however, he replied: "Absolutely not, 60,000 yards. That is a thousand rolls" (R. 333–334).

[9] Goldman's son testified that he had delivered some goods to petitioner Abrams in the "early 50's". (R. 615).

[10] Schneider also testified that the cutters were in fact forbidden by the Government inspector to return scrap which had fallen on the floor (R. 332), but it seems immaterial to the questions in this case whether the throwing away of such scrap was authorized or unauthorized.

Julius Markman, Fabric's production foreman, also testified that some scrap was used for other purposes and that scrap falling to the floor was thrown away (R. 642–646, 149a). He further testified that in the spring of 1951 additional storage space was needed for cut parts of the jackets and that they were stored on the first floor of the Mayflower premises on Liberty Avenue. On a visit to the premises he saw a box of piece goods tickets also stored there (R. 629–632, 149a–150a).[11]

B. PROCEEDINGS ON MOTION FOR NEW TRIAL

On August 26, 1957, four months after the verdict and over a month and a half after the sentencing, petitioners moved for a new trial on the basis of newly-discovered evidence which they claimed had been suppressed by the Government—namely, that Frank Oliveri, Fabric's head shipping clerk, and several other employees had, during the performance of the contracts, segregated wool clippings from the sweepings and sold them to junk dealers for their own profit. Although Oliveri allegedly told petitioner Abrams of the practice on the day after the verdict, Abrams took no steps to investigate further or to seek a new trial until after the sentencing over two months later (R. 787–788).

1. Oliveri stated by affidavit that some time "early in 1951" (R. 824) [12] he and his assistants began sep-

[11] The Government-type mill ticket found on the premises by the F.B.I. agent (*supra*, p. 6) had been found on the second floor (R. 75).

[12] James Baker, one of Oliveri's helpers, fixed the time as after the first week in April (R. 807–808). Al Frizell, Oliveri's

arating clippings from the cutting room sweepings and selling them, making no attempt to keep the salvage operation secret (R. 823–824, 826, 846). In addition to olive-drab wool serge, the clippings included navy blue serge and melton cloth, but there was "more brown than blue" (R. 827, 834).[13] Oliveri received "maybe eight cents a pound" for the clippings (R. 852; see also R. 828), and the money was divided with his two assistants and the night watchman (R. 829).[14] Oliveri and his helpers each realized an average of about $10 a week from this activity (R. 807–808, 810, 837). They reclaimed in this way between two-thirds and three-fourths of the sweepings (R. 851). The clippings were sold first to Novak and later to Herman, but not to both at the same time (R. 831–832).

Max Novak, the junk dealer to whom Oliveri said he first sold the clippings, refused to make an affidavit or permit his cashbook to be photostated (R. 790–791), but petitioner Abrams stated in his affidavit that he and others had interviewed Novak and that Novak had admitted buying woolen rags from Oliveri at a price from six to eight cents a pound, paying Oliveri a total of $1,884.75 for six purchases during

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other helper who worked there "during the middle of 1951", said that Oliveri "suggested after I was there a while" that they start separating and selling the scrap (R. 810).

[13] In his affidavit Abrams estimated that during the time the "Eisenhower" jackets were being cut, about 75% of the wool clippings in the trash would be of olive-drab wool serge (R. 794).

[14] Beginning in October, 1951, Nat Rosen, a subcontractor who cleaned and inspected finished garments for Fabric, also received a share (R. 805–806).

February–September 1951 (R. 788–790, 799)." The second junk dealer, Simpson Herman, stated by affidavit that he bought rags from Oliveri between "the winter of 1951" and March 1952, paying Oliveri ten cents a pound and "about $1,000 in all" (R. 804).

2. Oliveri also stated that he had been interviewed before the trial by Alan W. Richenaker, one of the Assistant United States Attorneys who tried the case, and Harold Good, an F.B.I. agent, and had told them of his selling of scrap. According to Oliveri, the statement angered Good, who made such statements as: "I'm going to make out I didn't hear that answer"; "You're stealing government property"; "Who put you up to say that"; "You are going to wind up holding the bag"; and "If you go up there as a witness, we'll rip you apart" (R. 838–844).

Agent Good, by affidavit, specifically denied making the alleged statements or any other attempt to intimidate Oliveri (R. 874–875). Richenaker, by affidavit, stated that he had interviewed Oliveri on March 1, 1957, nineteen days before the trial, about Fabric's shipping practices and handling of scrap and that Oliveri had mentioned that he had sold scrap from the

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[15] The alleged purchases were recorded on Novak's cashbook as being from "Beekman Clothes, Inc.", an operating company which was a Fabric affiliate, allegedly at Oliveri's request (R. 790). The first three of the purchases (February 16, March 26, and April 13, R. 799) were before the dates fixed by Baker and Frizell as the start of the salvaging operation (see note 12, *supra*). The other three (August 1 and 15 and September 6, R. 799) were during a period in which Fabric had suspended the cutting of jackets under the contracts (August–November 1951, R. 151a).

sweepings but said that Abrams or Hyman had told him that the Government did not want dirty cloth returned (R. 858–859, 870). Richenaker understood this to mean that Oliveri had specifically asked Abrams or Hyman about selling the scrap (R. 859). He expected Oliveri to be called as a defense witness (R. 861).[18]

Affidavits filed by defense counsel, when read with Oliveri's affidavit, show that Oliveri was interviewed by them the day before his interview with Richenaker and that after the interview he went directly to defense counsel, recounted the questions asked by Richenaker, and told them that the Government did not intend to call him as a witness (R. 896–897, 907–908). Defense counsel decided not to call Oliveri as a witness because he had a record of three felony convictions (R. 846–847, 897, 908).

3. In a memorandum opinion (R. 916–922), the district court denied the motion for a new trial because the "newly-discovered evidence" either was in fact or should have been available to petitioners before trial and because there was no basis for the claim that the Government had suppressed Oliveri's testi-

[18] In September, 1957, after the Government's counter-affidavits had been filed, Oliveri made another affidavit in which he repeated most of his former allegations and added that he had told Richenaker that he had received less than five cents a pound for the scrap and that Good had told him that other employees were also selling scrap. Oliveri said that he had been frightened and worried by Good's statements and thus pressured into not disclosing his sales to defense counsel (R. 883–885). These allegations were specifically denied by Richenaker and Good in later affidavits (R. 900–901, 910–911).

mony. He noted that defense counsel had been fully aware of that line of defense—having emphasized both in their opening and closing statements and in examining witnesses that some scrap was thrown out as sweepings—and that investigation of the sweepers and junk dealers was an obvious line of inquiry. Defense counsel had in fact interviewed Oliveri at least twice and, the court said, "I cannot believe" that they failed to question him on that subject. The court concluded that the evidence was not in fact pursued and offered at the trial only because it was "dangerous and inconclusive"—dangerous because it showed that Government property was in fact diverted, and inconclusive because Oliveri's estimates were so "vague and shifting as to be worthless", while Novak's records (even if he would testify and could identify the purchases from "Beekman Clothes" as being from Oliveri) did not correspond as to time either with the proffered testimony of Oliveri's helpers or the evidence at the trial of the suspension of cutting operations during part of the period (see note 15, *supra*). The court found, finally, that the claim that the Government had suppressed Oliveri's testimony was incredible for a number of reasons: the denials by Agent Good and the Government attorney of the statements attributed to them; the lack of any reason for them to fear Oliveri's testimony and the likelihood that it could in fact be turned to the Government's advantage on cross-examination; the inconsistency of Oliveri's immediate report of the interview to defense counsel with his claim of having been successfully intimi-

dated; and the absence of any reason for the Government to believe that petitioners were not already aware of Oliveri's activities.

Argument

1. Petitioners' attack upon the Government's "accounting" of the cloth not returned under the contracts misconceives the role of that evidence in the Government's case. The Government proved by direct evidence the sale by Abrams of 19,000 yards of olive-drab wool serge at a time when Abrams had possession of large quantities of such cloth furnished by the Government. The inference that the cloth sold was the Government's was supported by the surreptitious manner of payment; the fact that the sale was at somewhat less than the market price; the finding of a Government mill ticket at the Mayflower premises where the cloth sold was admittedly stored;[11] the flight of petitioner Berman to avoid inquiry about the sale; the concealment by petitioner Abrams of Berman's whereabouts; and the effort by Abrams, after the F.B.I. investigation began, to retrieve from the trucking company the receipts showing the deliveries of cloth to Alert (see Statement, *supra*, pp. 4–6). With this direct proof of a sale of cloth under circumstances themselves indicative of a

[11] There was testimony that Fabric did for a time, because of a shortage of storage space, store cut jacket parts on the first floor of the Mayflower premises, and that one of Fabric's employees also saw a box of piece goods tickets there (Statement, *supra*, p. 10). No explanation was offered for the presence of the piece goods tickets, however, and the Government mill ticket was in any event found on the second floor.

misappropriation of the Government-furnished cloth, the Government's further proof of the amount of cloth not returned under the contracts was merely corroborative—it negatived the possibility that all of the cloth furnished had been returned and hence could not have been the source of that sold. The accounting was not, as in the net worth tax cases relied upon by petitioners, made the primary proof of the crime charged, and hence those cases are not in point.

Petitioners' criticism of the accounting, moreover, is premised upon attributing to each step of the accounting a purpose it was never intended to serve. The "paper test" was used only as a way of measuring the area of a pattern, and its validity for that limited purpose cannot be questioned. The area of the patterns was then related to the area of cloth actually contained in the finished garments by testimony that the garments were accurately cut from the patterns. Adding the yardage contained in the delivered garments to the scrap actually returned[18]

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[18] The scrap, measured by weight, was converted to yards at the ratio of 18 ounces per linear yard. Petitioner Abrams contends (No. 733, Pet. 9, footnote) that the weight of wool serge varies as much as 12% per linear yard. The testimony at the trial, however, showed that while a linear yard of wool serge might weigh as little as 17.5 ounces (about 3% underweight), the balance of the 12% variation between extremes would be overweight goods (R. 514). The use of 18 ounces as the stated weight per linear yard thus tended to overstate the number of linear yards returned as scrap, which in turn benefited petitioners by understating the shortage. The objection that the scrap was not conditioned before weighing (No. 733, Pet. 9) is similarly without substance. There was no testimony that unconditioned scrap would weigh appreciably

gave the total amount of cloth physically returned to the Government. The balance represented simply the amount of cloth furnished by but not physically returned to the Government—or, as described on the Government's exhibit, the "Serge unaccounted for and not returned to QM" (No. 732, Pet. 54).

The Government's accounting, therefore, established only the gross amount of the shortage and did not purport in itself either to prove a misappropriation or to disprove manufacturing losses. Where the shortage had gone was left to other proof. Some of the shortage was admittedly due to the use of scraps for incidental purposes and the throwing away of clippings which had fallen to the floor. There was direct evidence, however, to show that Fabric's cutters minimized waste in their use of the cloth, using first-class commercial practices, and that the losses of scrap in incidental uses and sweepings could not possibly have been as much as the shortages. While it was obviously impossible to prove the exact amount of the incidental losses, the cloth petitioners were alleged to have sold (19,000 yards) was less than two-thirds of the shortage under the first two contracts (30,793 yards) and much less than one-half of the total shortage (46,451 yards), thus allowing a wide margin for unrecovered waste.

Whether or not the evidence of the gross shortage and of the small amount of the incidental losses would be enough alone to support the convictions—

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less than conditioned scrap, and the inevitable presence in unconditioned scrap of foreign substances would indicate just the opposite.

the question seemingly argued by petitioners—that evidence combined with the direct proof of the sale and of the surrounding circumstances indicating a conversion of Government property was, we submit, more than sufficient to support the verdicts. The question in any event is solely one of the sufficiency of the evidence and presents no question appropriate for review by this Court.[19]

2. As this Court noted in *United States* v. *Johnson*, 327 U.S. 106, where a trial judge who conducted the trial has considered the affidavits and counter-affidavits on a motion for a new trial on the ground of newly-discovered evidence, and has denied such application, it is not ordinarily the function of an appellate tribunal to review such finding. This Court said (p. 111) that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances * * *." We think that there are no such circumstances in the present case.

The trial court expressly found that defense counsel knew, or at least ought to have known, of Oliveri's

[19] Petitioners' claim that they were denied the right of cross-examination (No. 732, Pet. 19–20; No. 733, Pet. 26–29) is but a re-casting, in constitutional garb, of their claim that crucial elements of proof were lacking. They obviously could not cross-examine a witness who did not testify, but the defect, if any, would be the failure of proof, not the denial of cross-examination. And they did in fact cross-examine all the witnesses who had anything to do with the measurement of the area of the patterns, which is all the "paper test" purported to be.

claimed sales of scrap prior to the trial. The claim that scrap falling to the floor was swept out as trash was a major line of defense at the trial, one that was argued and reargued on behalf of all the petitioners. With the case in that posture it seems hardly likely that defense counsel failed to talk to Oliveri—who was in charge of sweeping out the cutting rooms—about sales or other disposition of scrap.[*] Oliveri had spoken to petitioner Abrams or Hyman about the disposition of dirty scrap during the life of the contracts, and they were surely aware of the trade custom regarding the sale of scrap, since defense counsel mentioned it during trial. Defense counsel talked to Oliveri twice before trial and rejected him as a witness because of his criminal record, not because he had nothing to contribute.[*] If it occurred to Oliveri to mention the sale of scrap to the Government's attorney, it must also have occurred to him to tell defense counsel of these activities.

Even if in fact defense counsel did not know before trial that Oliveri claimed to have sold scrap—though the district court concluded that they did—the rule governing new trials "requires due diligence of him who invokes it" (*United States* v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937) and due diligence before trial would have unearthed the evidence which is to be found in the affidavits filed in support of the motion for a new trial. In these circumstances, the

[*] It is also true, as the district court pointed out, that Oliveri's evidence—which afforded no firm facts from which calculations could be made—would have been inconclusive and, because of the effect on the jury of the admission of diversion of Government cloth, dangerous as well.

affidavits supporting the motion for a new trial amount to "much less than enough to show any abuse of discretion in the denial of the motion." *United States* v. *Cordo*, 186 F. 2d 144, 148 (C.A. 2), certiorari denied, *sub nom. Minkoff* v. *United States*, 340 U.S. 952; *United States* v. *On Lee*, 201 F. 2d 722, 723-724 (C.A. 2), certiorari denied, 345 U.S. 936.

The claim that the Government intimidated Oliveri and suppressed his testimony is equally without substance and was properly rejected by the district court.

3. In March, 1953, Joel R. Strykower, the military apparel designer at the Philadelphia Depot (R. 345), had made a set of paper patterns to be used for the paper test for this case (R. 364–365, 407). An affidavit made by him three days after the patterns were cut was used to refresh Mr. Strykower's recollection at the trial, and the affidavit was then turned over to defense counsel (R. 406–407). Strykower was also in possession of another affidavit made shortly after the first one. The trial judge examined the second affidavit and stated that it had no connection either with the patterns or with the testimony which had been given by the witness (R. 407–408). He therefore decided to "hold it for the time being" rather than turn it over to defense counsel (R. 408–409). Defense counsel offered no objection when the judge declined to turn over the second affidavit (R. 407–409).

It later developed that the sets of paper patterns which Strykower had made in 1953 had been made from the wrong master patterns and were ¼ to 5/16 inch shorter than the master patterns furnished to Fabi (R. 388–389, 410–411). The trial was ad-

journed and new sets of paper patterns for the test were made which were identical to the master patterns furnished to Fabric (R. 412–413, 448–458). The computations of the area of cloth contained in the jackets made by Fabric were made on the basis of this second set of paper cuts (R. 459, 541).

Contrary to petitioners' contention (No. 733, Pet. 24–26), the incident with respect to the second Strykower affidavit made in 1953 presents no issue under *Jencks* v. *United States*, 353 U.S. 657, or 18 U.S.C. (Supp. V) 3500. The trial judge did not flatly reject defense counsel's demand, but only decided to hold the affidavit "for the time being", thus indicating that it would have been turned over, as the first one was, if the further testimony had indicated that it was relevant. Thereafter, the whole matter became moot when it developed that the 1953 paper patterns had been taken from the wrong master patterns, and defense counsel did not mention the affidavit again.

4. Petitioners contend (No. 732, Pet. 21–23) that they were prejudiced by the testimony of Cooper regarding Hartman's offer to sell him cloth (Statement, *supra*, p. 5, fn. 6). The testimony was clearly admissible against Hartman notwithstanding his ultimate acquittal. The trial court explicitly instructed the jury at the time the testimony was given that the statements made by Hartman to Cooper were not admissible against petitioners "unless at the conclusion of the trial you should conclude that there was a conspiracy among the four defendants [*i.e.*, Abrams, Berman, Hyman, and Hartman], that Mr. Hartman was in a sense acting as an agent for the other three"

(R. 45). Petitioners were entitled to no more than that (*Lutwak* v. *United States*, 344 U.S. 604, 619; *Blumenthal* v. *United States*, 332 U.S. 539, 559–560), and it is to be presumed that the jury heeded this instruction (*Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95).

5. Prior to trial, the defendants Fabric, Abrams, and Hyman moved for and were allowed a bill of particulars as to the time and place of the submission of the false statements alleged in the false-statement indictment (No. C 144–185), arguing that they needed such information to determine whether the venue was properly laid (SR. 2a). At the trial, the Government's evidence showed that the statements as to the inventories and returns of property were submitted to the New York Quartermaster Procurement Agency in the Southern District of New York (R. 664, 716–735, Gov. Exs. 21–A–1, 24–A–4, 24–A–1, 24–A–2). After the Government had completed its case, defendant Hyman moved for a judgment of acquittal, one ground being that the Government had failed to prove venue as to the false statement offenses and presumably also as to the conspiracy count of indictment No. C 144–188, which alleged the false statements as overt acts (R. 38; SR. 8a–12a). The trial judge submitted the question of venue to the jury, requiring it to find that the false statements were directed to an officer within the Southern District and that the defendants knew and in-

tended this (R. 664–665). By their verdict convicting Hyman (reversed on appeal on other grounds); the jury upheld the venue.

Petitioners contend that venue as to the conspiracy count was not proved (No. 732, Pet. 24–25). In the circumstances related above, petitioners lack standing to raise the issue. The only objection on this score was not interposed until the Government had completed its case, and even then it was raised only by Hyman, primarily as an objection to the false statement counts. Even assuming that petitioners are entitled to invoke Hyman's motion, the objection came too late. *United States* v. *Miller*, 246 F. 2d 486, 488 (C.A. 2), certiorari denied, 355 U.S. 903; *United States* v. *Spagnuolo*, 168 F. 2d 768, 771 (C.A. 2), certiorari denied, 335 U.S. 824; *Hagner* v. *United States*, 54 F. 2d 446, 447–449 (C.A.D.C.), affirmed, 285 U.S. 427.

In any event, this contention is utterly without merit. As the court of appeals noted, the false statements were also alleged as overt acts in the conspiracy count, and it was shown that the statements were submitted to, and found in the files of, a Government office located in the Southern District. That was enough to show venue in the Southern District of New York. 18 U.S.C. 3237; *United States* v. *Miller*, *supra*, 246 F. 2d at 488; *De Rosier* v. *United States*, 218 F. 2d 420, 422–423 (C.A. 5), certiorari denied, 349 U.S. 921.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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